No. 97-1909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MURPHY BROTHERS, INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the 30-day removal period provided by 28 U.S.C. § 1446(b) begins to run prior to service of process when a named defendant receives a copy of the complaint by any means and from any source.

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INTEREST OF *AMICUS CURIAE*

This Brief in support of the Petitioner is submitted by the Defense Research Institute ("DRI") pursuant to Supreme Court Rule 37.5. DRI is an organization with members throughout the United States numbering in excess of 21,000.[1] It seeks to advance the cause of the civil justice system in America by ensuring that the concerns

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioner and Respondent had no part in authoring any portion of this Brief. No one other than DRI made a monetary contribution to the preparation or submission of this Brief. Additionally, counsel for both parties have given their written consent to the filing of this Amicus Brief by submitting a letter indicating such consent to the Clerk of the Court.

of the defense bar and potential defendants are properly and adequately represented.

These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation particular to the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

Because the question before this Court concerns the availability of federal court removal to civil defendants and the time for exercising removal rights under 28 U.S.C. § 1446(b), DRI has an important interest in the outcome of this case. Whether the 30-day removal period is to be measured by a defendant's mere receipt of the initial pleading or from the date of service of process, the organizations and lawyers who make up DRI will be profoundly influenced by any decision. Amicus DRI seeks an opinion from this Court interpreting 28 U.S.C. § 1446(b) as triggering the 30-day removal period no sooner than the date of service.

SUMMARY OF ARGUMENT

The receipt rule endorsed by the Eleventh Circuit has broad implications for litigants and their counsel in removal situations. Beginning the 30-day removal period of 28 U.S.C. § 1446(b) whenever a defendant receives, from any source whatsoever, a copy of the initial pleading, encourages a practice fraught with legal, ethical and practical problems. By triggering legal obligations on such informal receipt rather than formal service, the receipt rule has the real and substantal potential of discouraging pre-suit settlement negotiations, penalizing the conciliatory defendant, and rewarding the cunning claimant.

Adherence to the receipt rule also threatens principles of fundamental fairness and notice in judicial proceedings. Obligating a civil defendant to appear in a proceeding to invoke his removal rights—before even an attempt at services of process—strikes Amicus DRI as fundamentally unfair. A party over whom the court has not acquired personal jurisdiction should not be subject to procedural penalties, such as the forfeiture of valuable removal rights. Beyond encouraging forum-shopping, the receipt rule also enables a plaintiff to block his opponent's potenital exercise of removal rights by allowing him to convey misleading notice. Amicus believes Congress never intended such legal maneuvering when it amended the removal statute in 1949 and DRI urges this Court to interpret the statute consistent with its legislative history and purpose.

ARGUMENT

I. THE INFORMAL NATURE OF THE "RECEIPT RULE" CREATES LEGAL AND PRACTICAL PROBLEMS FOR LITIGANTS.

Removing a case to federal court must be done quickly —within 30 days "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . ." The interpretation of 28 U.S.C. § 1446(b) adopted by the Eleventh Circuit means that the 30-day removal period is triggered whenever a defendant comes into possession of the initial pleading from any source, regardless of whether it is acquired through formal service of process, informal conveyance from the plaintiff or his lawyer, or through discovery initiated by the defendant himself. Beginning the 30-day removal period with such an informal "receipt rule" is like starting a 100-yard dash using a silencer rather than a starter's pistol—the runners know *where* they should race but are uncertain *when* the race begins.

A. The Receipt Rule Discourages Settlement, Forces Litigation, and Invites Lawyer Gamesmanship.

Counsel for Petitioner and other *Amici* have ably demonstrated the fallacy of the receipt rule through statutory

construction and an examination of the legislative history surrounding 28 U.S.C. § 1446(b). Whether the language or history of the statute could support the Eleventh Circuit's interpretation of 28 U.S.C. § 1446(b), it certainly creates all the wrong incentives. By forcing defendants to appear to protect removal rights before they have been served with process, the receipt rule deters pre-suit settlement possibilities and rewards shrewd trial lawyers who are able to lull their opponents into a false sense of security by presenting them (yet not serving them) with "courtesy copies" of the complaint.

Public policy has always favored settlement over litigation as a means of resolving disputes. *Marek v. Chesny*, 473 U.S. 1 (1985); *Maher v. Gagne*, 448 U.S. 122 (1980); and *Williams v. First National Bank*, 216 U.S. 582 (1910). Once a lawsuit is filed and defendants are forced to appear, they assume the role of litigation adversaries and attempts at conciliation are more often than not futile.

While there may exist sound reasons for forcing a defendant to invoke the right to remove quickly, DRI believes the 30-day removal period of 28 U.S.C. § 1446(b) should not be interpreted to begin any sooner than the date on which formal service of process is at least attempted on the defendant. Starting the 30-day clock any sooner forces an adversarial relationship upon the parties that is neither favored by public policy nor intended by the Congress that adopted the 1949 amendments to 28 U.S.C. § 1446(b).

Consider the pre-suit dilemma faced by the governmental defendant. The vast majority of states have enacted laws requiring a notice of claim to precede the filing of an action to enable state and local governments to assess their potential for liability and settle meritorious claims short of litigation. *Felder v. Casey*, 487 U.S. 131 (1988). A local governmental entity may seek to negotiate a pre-suit settlement with the claimant whose attorney

may also provide government counsel with a courtesy copy of the complaint recently filed in state court. Suppose the courtesy complaint includes a variety of state law tort claims as well as civil rights claims under 42 U.S.C. § 1983, providing a basis for federal-question jurisdiction under 28 U.S.C. § 1331 and, hence, removal to federal court under 28 U.S.C. § 1441(b). While the parties may be on the verge of settlement, the receipt rule compels the government attorney desiring removal to act immediately by appearing in the case and thereby forces an adversarial relationship upon the parties that does nothing but harm the very settlement prospects the "courtesy copy" was supposed to foster.

Perhaps the greatest irony in the receipt rule is its ability to promote one-sided forum-shopping. The word "remove" means, quite literally, "to move back." *Webster's II New Riverside University Dictionary* at 995 (1994). Removal enables a defendant to correct a defect in the plaintiff's choice of forum by transferring the case to the federal forum—where it belonged in the first instance under either diversity or federal question jurisdiction. While Congress was certainly entitled to impose a short 30-day period in which removal rights must be exercised by defendants, Congress could not have intended the mischief the receipt rule invites by allowing a plaintiff to initially file suit in the forum of his choice and then supply misleading notice of the action in order to defeat his opponent's exercise of removal rights. *See Wecker v. Nat'l Enameling & Stamping Co.*, 240 U.S. 176, 186 (1907) ("[T]he Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right, and should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts in proper cases to retain their own jurisdiction.").

Interpreting the 30-day removal period of 28 U.S.C. § 1446(b) to begin upon service rather than receipt of

the complaint is not only supported by clear congressional intent from the 1949 amendment, such an interpretation would curtail the type of gamesmanship reflected in the published case law. *See generally Conticommodity Services, Inc. v. Perl,* 663 F.Supp. 27 (N.D. Ill. 1987) (defendant's discovery of complaint and summons under his apartment door when he returned home began the running of 30-day removal countdown); *Brown v. Mayflower Transit, Inc.,* 960 F.Supp. 212 (W.D. Mo. 1997) (receipt of fax copy of courtesy complaint by defendant's attorney started removal period); *Pillin's Place, Inc. v. Bank One, Akron, NA,* 771 F.Supp. 205 (N.D. Ohio 1991) (facsimile transmission of courtesy copy of complaint triggered 30-day removal and there was nothing in the record indicating that plaintiffs were attempting to "reap the benefits of gamesmanship."); *Love v. State Farm Mutual Automobile Insurance Co.,* 542 F.Supp. 65 (N.D. Ga. 1982) (removal period did not begin until formal service of process even though plaintiff had filed complaint and mailed unconformed copy to defendant with a letter saying he had directed marshall not to serve process and that he hoped to settle the matter without litigation); and *Silverwood Estates Dev. Limited Partnership v. Adcock,* 793 F.Supp. 226 (N.D. Ca. 1991) (courtesy copy of complaint sent to defendant to review after he had requested a draft; 30-day countdown began upon receipt of courtesy copy). *See also* R. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court,* 52 Md. L. Rev. 374 (Winter 1993).

B. The Receipt Rule Encourages Lawyers and Their Clients To Remain in the Dark in the Information Age.

Because the 30-day period for removal under the receipt rule is triggered any time a defendant comes into possession of a copy of the complaint from any source, it is immaterial whether the copy is sent by plaintiff's counsel or is discovered by the defendant himself. Measuring the 30-day period from receipt rather than service, therefore, requires defendants to adhere to an honor system which may have the unintended effect of encouraging defendants and their lawyers to remain uninformed.

The case before this Court involves the transmission of a facsimile copy sent to a defendant knowledgeable about litigation strategy—the vice president/risk manager for Petitioner Murphy Brothers, Inc. Because the receipt of a facsimile transmission is but one of numerous ways in which a defendant may come into possession of a copy of the initial pleading, this Court should also consider the broader implications of the receipt rule in the information age courts are entering with increasing frequency. Some state court systems, for instance, have already established websites on the Internet to enable the public to track and discover court dockets on a daily basis. A defendant or his attorney may be aware of an adverse incident and may be attempting to settle it short of litigation. Performing a simple word search on the local state court's website may disclose that the action the defendant is attempting to settle has already been filed. The same is true of certain high-profile cases reported by the media—lawsuits about which defendants and their attorneys may know nothing until reading about the filing in the newspaper or discussing the matter with a reporter.

Should the defendant or his attorney obtain a copy of the complaint from the courthouse? Those who regard knowledge as power will likely obtain a copy of the complaint, regardless of the consequences. The Eleventh Circuit's receipt rule, however, has the effect of burdening that knowledge by discouraging parties from discovering the contents of lawsuits filed against them, denying or disputing the date on which such knowledge was acquired, or forcing them to exercise removal rights during a conciliatory period of settlement negotiations.

The dispute among lower courts has only added to the uncertainty civil defendants face when receiving copies of lawsuits containing the basis for removal to federal court. *See* D. Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359 (Winter 1992). Adoption of a receipt rule, however, presents more problems than it solves. Unlike a well developed body of law establishing service dates with a reasonable degree of certainty, the date on which a copy of an initial pleading is informally received by a defendant will likely be the subject of intense dispute. Questions concerning agency, the actual receipt date, and whether the form of document received qualifies as an "initial pleading" are likely to generate continuing interpretation problems for lower courts.[2] Fixing a statutory accrual date on such an informal event—with no judicial mechanism in place to monitor its occurrence—is contrary to the history and purpose of the removal statute and does little to promote candor and fair play among the parties.

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[2] The lack of clarity in the removal statute and the informal nature of the receipt rule has prompted some attorneys to contend that a defendant's receipt of an *unfiled* complaint triggers the 30-day period. *See Arnold v. Federal Land Bank of Jackson*, 747 F. Supp. 342 (M.D. La. 1990) (30-day period did not begin to run on defendant's receipt of courtesy copy of petition that had not even been filed with state court); and *Campbell v. Associated Press*, 223 F. Supp. 151 (D.C. Pa. 1963) (draft of complaint submitted to defendant in furtherance of settlement with agreement to defer filing and which was never filed and form submitted was not a copy of "initial pleading," the receipt of which would commence removal period). A complaint that was filed but not signed was held sufficient to trigger the 30-day period because the local signature requirement was deemed to be a technical, rather than jurisdictional, defect. *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 843 (5th Cir. 1996).

II. A DEFENDANT OVER WHOM JURISDICTION HAS YET TO BE SECURED SHOULD NOT BE FORCED TO APPEAR AS A PARTY TO PROTECT HIS REMOVAL RIGHTS.

Amicus accepts without argument Congress' authority to prescribe the method by which removal jurisdiction is invoked, the time perod in which it must be exercised, and the consequences of an untimely removal request. *See City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966); and *Martin v. Hunter's Lessee*, 1 Wheat. 304, 349, 4 L.Ed. 97 (1816) ("The time, the process, and the manner [of removal] must be subject to [Congress'] absolute legislative control."). DRI does question, however, the constitutional auhority of Congress to insist that a defendant—over whom jurisdiction has yet to be acquired through even attempted service—must act immediately to invoke his removal rights under federal law. The Eleventh Circuit's interpretation of 28 U.S.C. § 1446(b) has the unfortunate (and perhaps unconstitutional) consequence of elevating the need for speed in invoking a federal court's derivative jurisdiction under Article III over personal jurisdiction and its emphasis on notice and fairness under the Due Process Clause.

In a series of cases dating back to the earlier part of this century, the Court emphasized that an improperly served defendant retains the ability to raise jurisdictional objections after removal to federal court is effected. *See generally Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377 (1922) ("If a state court lacks jurisdiction over the subject or over the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."); *General Inv. Co. v. Lakeshore & N.S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("Where a cause is removed from a state court into a federal court, the latter takes it as it stood in the former. A want of jurisdicion in the state court is not cured by the removal, but may be asserted after it is consummated."); *Mechanical Appliance Co. v. Castleman*, 215

U.S. 437 (1910) (no jurisdiction over defendant improperly served despite removal to federal court); and *Wabash Western R. Co. v. Brow,* 164 U.S. 271 (1896) (personal jurisdiction objections not waived by removal to federal court). When interpreting the removal statute in existence at the time, this Court's *Wabash* opinion further noted that "the only reasonable inference is that Congress contemplated that the petition for removal should be filed in state court *as soon as the defendant was required to make any defence whatever in that court,* so that, if the case should be removed, the validity of any and all of his defences should be tried and determined in [the federal court]." *Id.* at 277-78 (emphasis added.) *See also Arizona v. Manypenny,* 451 U.S. 232, 242 n. 17 (1981) ("In the area of general civil removals, it is well settled that if the state court lacks jurisdiciton over the subject matter or the parties, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there.").

These cases give assurance to the civil defendant that his exercise of removal rights will not operate to forfeit any challenges to the sufficiency of process he may seek to assert in federal court after removal. But can a defendant constitutionally forfeit removal rights in the complete absence of any attempt to serve him with process? While most of these cases developed during a time when courts adhered to the outdated distinction between general and special appearances, an "appearance" remains the term used to describe a defendant's method of entering an action to assert defenses and objections to the proceeding, DRI doubts there exists any constitutional authority for compelling a civil defendant to enter an appearance in an action (by noticing its removal to federal court) when there has been no attempt to serve process on that defendant or acquire jurisdiction over him. *Compare Omni Capital Int'l. Ltd. v. Rudolf Wolff & Co., Ltd.,* 44 U.S. 97, 104 (1987) ("Before a court may exercise personal jurisdiction over defendant, the procedural requirement of

service of summons must be satisfied."). The filing of a notice of removal effectively replaces the state court with a federal forum and is no different functionally from the type of subject matter jurisdiction and venue objections recognized under Rule 12(b)(1) and (3), Federal Rules of Civil Procedure. Forcing a court appearance on an unserved defendant and attaching penalties to his non-appearance—through the forfeiture of removal rights—is fundamentally unfair.

A basic requirement of due process is the opportunity to be heard "in a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Due process requires, at a minimum, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 550. In a case where notice was found lacking by attempting service through publication in a local newspaper, this Court emphasized that the "notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citations omitted).

To the extent 28 U.S.C. § 1446(b) can be interpreted to support a "receipt rule" in which a defendant must exercise removal rights after acquiring knowledge of a lawuit's contents but before attempted service of process, such an interpretation implicates serious Due Process concerns. The problem is not that a defendant is without any notice; the defect lies in the *misleading* type of notice given. Either through self-discovery, the feigned kindness of opposing counsel, or other means, a defendant comes into possession of a copy of the initial pleading. He is not informed, however, that he must answer the lawsuit or file a responsive pleading within a specific time period to avoid default. He is told nothing about the potential

consequences of inaction and therefore does not believe any exist. The Eleventh Circut's receipt rule unfortunately endorses a practice by which such misleading notice is sufficient to trigger a defendant's duty to act and, in the absence of noticing the removal within 30 days, all removal rights become forfeited.[3]

Adopting the service rule is the only way to reconcile the language and history of the removal staute with the constitutional limitations on Congress' authority to prescribe the timing and method by which removal rights are exercised. The service rule ensures that valuable removal rights are not lost unless and until there has been at least some attempt by the plaintiff to subject the defendant to the personal jurisdiction of the court through service of process. The service rule further assures the litigants a measure of formality in the manner in which judicial proceedings are commenced and procedural rights exercised. Because the service rule satisfies notice and fundamental fairness concerns that the receipt rule disregards, DRI urges this Court to hold that the 30-day removal period of 28 U.S.C. § 1446(b) dos not begin to run until a defendant receives a copy of the initial pleading via service of process.

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[3] The problem is exacerbated by an examination of 28 U.S.C. § 1441(b), which provides that only those parties "who are properly joined and served" as defendants must be considered in determining whether a case is removable. The interplay between Sections 1446(b) and 1441(b) is fully addressed in Petitioner's Brief and Amicus agrees that the receipt rule cannot be reconciled with 28 U.S.C. § 1441(b).

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the decision of the Eleventh Circuit should be reversed, and the 30-day removal period of 28 U.S.C. § 1446(b) interpreted as beginning no sooner than the date of service of process.

Respectfully submitted,

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